92-1458

Supreme Court, U.S.
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No.

in the Supreme Court of the United States

OCTOBER TERM, 1992

ALBERTO A. ROSALES, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a defendant in a federal criminal case forfeits his right to appeal a conviction to the Court of Appeals where the defendant became a fugitive during trial, but was recaptured prior to being sentenced and before filing a notice of appeal.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

On October 28, 1992, the United States Court of Appeals for the Eleventh Circuit entered the judgment from which we seek review.

Jurisdiction is vested in this Court pursuant to the provisions of 28 U.S.C. 1254(1) Supreme Court Rules 10.1(a) and 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides in pertinent part:

> No person shall — be deprived of life, liberty, or property, without due process of law.

The United States Constitution, Amendment XIV, provides in pertinent part:

> Section 1. — No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the

District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner became a fugitive the day before closing arguments in a criminal trial that last more than three weeks. The trial proceeded without Petitioner. He was convicted on all counts in absentia, and he was sentenced approximately two years later after his recapture to a period of 85 years imprisonment. His notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed after his recapture. In an unpublished opinion, the Court of Appeals dismissed the portions of Petitioner's appeal involving substantive trial issues on the ground that Petitioner had become a fugitive and thereby forfeited his right to appeal, relying on the split panel decision in *United States v. London*, 723 F.2d 1538 (11th Cir. 1984). The Eleventh Circuit did rule on one of the points raised in Petitioner's direct appeal dealing with a sentencing issue.

The Eleventh Circuit's position in *London* is expressly contradicted by the law in the United States Court of Appeals for the First Circuit in *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988).

Federal jurisdiction was conferred at the outset of this case because Petitioner was indicted in the United States District Court for the Southern District of Florida, was tried and convicted in that court. Jurisdiction then vested in the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. Section 1291.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the decision of the Eleventh Circuit Court of Appeals in *United States v. London*, 723 F.2d 1538 (11th Cir.) *cert. denied*, 467 U.S. 1228 (1984), is squarely in conflict with the opinion of the First Circuit Court of Appeals on the same issue, as embodied in *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988).

ARGUMENT

A DEFENDANT IN A FEDERAL CRIMINAL CASE SHOULD NOT BE DENIED APPELLATE REVIEW OF HIS CONVICTION IN THE APPROPRIATE UNITED STATES COURT OF APPEALS IN CIRCUMSTANCES WHERE THE DEFENDANT BECAME A FUGITIVE DURING TRIAL AND WHERE SUCH DEFENDANT WAS NOT SENTENCED AND THEREFORE DID NOT FILE A NOTICE OF APPEAL OF HIS CONVICTION UNTIL AFTER HIS RECAPTURE.

Petitioner contends that the holding in *United States v. London*, 723 F.2d. 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984), is erroneous because it arbitrarily allows an appellate court to impose harsh punishment (forfeiture of the appeal) on a defendant who may have committed the crime of bond jumping before his case ever reached the Court of Appeals. This Court should resolve the direct conflict between the Eleventh and First Circuit Courts of Appeal by adopting the reasoning and conclusions of the First Circuit Court of Appeals as expressed in *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988), and Circuit Judge Johnson's dissenting opinion in *United States v. London*, 723 F.2d at 1540-1541. A Court of Appeals should have the authority to dismiss an appeal of a criminal defendant in

such circumstances only if the defendant became a fugitive *after* the notice of appeal was filed.

The *London* decision, upon which the appellate panel relied in the instant case (App. 1), was a split panel decision which held that a defendant who had escaped during trial and remained a fugitive until after trial forfeited his right to appeal the conviction in his case because he became a fugitive during trial. The two judge majority in *London* arrived at its conclusion by stretching existing case law to justify the result.

The benchmark decision on this issue was rendered by this Court in *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed. 2d 586 (1970). *Molinaro* concluded that dismissal of an appeal was appropriate because the defendant escaped and remained a fugitive *subsequent* to the filing of the notice of appeal, thereby disrupting the orderly process of the Court of Appeals (a docketed appellate case could not proceed on schedule), demonstrating contempt for the very court from which he was seeking relief.

The Eleventh Circuit Court of Appeals stretched the *Molinaro* decision in *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982), by concluding that a defendant who fled after conviction but before sentencing had waived his right to an appeal by engaging in such conduct. The *Holmes* court reasoned that the act of fugitiveness constitutes defiance of the "legal system" and, as such, the Court of Appeals can exercise its power to dismiss an appeal even though the transgression occurred while the case was still pending in the District Court, and despite the fact that the defendant could have been punished by being charged with bond jumping and/or contempt of court. By the same reasoning, a Court of Appeals could decide to punish a defendant for disrespecting the "legal system" by engaging

in unbecoming conduct during his trial, or for becoming a fugitive at the outset of the case, only later to be apprehended, tried and convicted.

Two years later, in *United States v. London, supra.*, the Eleventh Circuit Court of Appeals applied the same draconian result of dismissal of an appeal to a defendant who fled during a lengthy and complicated multi-defendant trial. As the majority wrote: "It would be anomalous to hold that Holmes lost his right to appeal by fleeing after conviction but that London retains his right to appeal because he fled during trial." *Id.* But the *London* majority opinion was also premised on the fact that London fled in the midst of a complex multi-defendant trial that lasted many weeks, thereby placing the trial court in a position of having to sever London out and to retry him at a later date after he was apprehended.

The reasoning of Circuit Judge Johnson, who wrote the dissenting opinion in *London*, and that of the unanimous panel of the First Circuit Court of Appeals in *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988), point out the crucial distinction between an appellate court exercising its discretion to punish an appellant who abuses the process of that court,[1] rather than utilizing the substantially more punitive measure of dismissing an appeal as against a party who committed a transgression against the District Court.[2]

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[1]Judge Johnson cited to binding precedent of the Eleventh Circuit approving the policy of dismissing appeals against those who flout the appellate process by escaping after the notice of appeal is filed. *United States v. Shelton*, 508 F.2d 797, 799 (5th Cir.), *cert. denied*, 423 U.S. 828, 96 S.Ct. 45, 46 L.Ed. 2d 44 (1975); *Johnson v. Wainwright*, 615 F.2d 1077, 1079-80 (5th Cir. 1980).

[2]Of course, the District Court has almost unlimited sentencing discretion under the criminal contempt statute.

In *Anagnos*, the defendant fled after conviction but before sentence. He was then indicted for bail jumping and reapprehended. The Government moved to dismiss Anagnos' appeal and asked the First Circuit to extend its decision in *United States v. Puzzanghera*, 820 F.2d 25 (1st Cir.), *cert. denied.* ____ U.S. ____, 108 S.Ct. 237, 98 L.Ed. 195 (1987), which was a case where the First Circuit dismissed an appeal of a defendant who escaped *after* filing a notice of appeal. The reasoning of the *Anagnos* court, which we ask this Court to adopt, was as follows:

> Absconding before sentence is another matter. It is true that the Eleventh Circuit has held that such a defendant has, equally, in effect waived his right of appeal from his conviction, [citing *United States v. Holmes*], the court saying that to distinguish fleeing before sentence and after taking an appeal 'would fly in the face of common sense and sound reason.' 680 F.2d at 1374. We think, however, that *Puzzanghera* goes to the limit. *Anagnos' misconduct was in the District Court, and should affect consequences in that court, not in ours. Nor do we understand the logic of the Eleventh Circuit, which would hold a defendant fleeing during trial unable to appeal errors in his conviction, but able to appeal irregularities in the sentence imposed after recapture.* [Citation omitted] [Emphasis added].

The reasoning in *Anagnos* is far more compelling than in the *London* majority opinion or, for that matter, *Holmes*. Why, for example, should Petitioner's in-trial fugitiveness have earned him a dismissal of the portions of his appeal dealing with errors at trial, but not for sentencing mistakes? *See, App. 1.* In addressing the one issue raised on Petitioner's direct appeal dealing with a post-trial error, the Eleventh Circuit Court of Appeals vacated illegal sentences

on three counts totalling fifteen (15) years imprisonment. Why should the appellate court stop there, especially since the remaining issues in Petitioner's case dealt with serious questions involving the quantum of proof and prosecutorial misconduct that could have resulted in a new trial.

Assuming the trial errors raised on direct appeal would have resulted in a reversal and remand, then the net effect of the Eleventh Circuit's dismissal of Petitioner's appeal was tantamount to that court sentencing Petitioner to seventy (70) years in jail (which is a life sentence for Petitioner) as punishment for becoming a fugitive in the District Court before his case was ever docketed in the Eleventh Circuit. Such a blatant denial of the due process and equal protection clauses of Articles V and XIV of the United States Constitution must not be tolerated.

The line was appropriately drawn in cases such as these by this Court in *Molinaro*, and it should remain there.[3]

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[3]We note that the Second Circuit at first questioned its power to deny an appeal because of pre-judgment fugitiveness, and refused to so in *United States v. Baccollo*, 725 F.2d 170, 171-172 (2d Cir. 1983). Then, in *United States v. Matista*, 932 F.2d 1055 (2d Cir. 1991), the Second Circuit adopted the Eleventh Circuit's reasoning in a case factually similar to *London*. *See also, United States v. De Valle*, 894 F.2d 133, 136 (5th Cir. 1990), which dismissed an appeal, and *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984), which permitted the appeal to proceed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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DATED: January 25, 1993

Appendix

[FILED OCT. 28, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5330
Non-Argument Calendar

D.C. Docket No. 85-00382-CR-WJZ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERTO A. ROSALES, SR.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, Chief Judge, FAY and BIRCH, Circuit Judges.

PER CURIAM:

Appellant was tried on a variety of charges dealing with controlled substances. During the trial, appellant failed to appear. The trial was completed and appellant convicted *in absentia*. Several years later he was apprehended and returned for sentencing.

On this appeal, the following issues are presented:

I. There was insufficient credible evidence to convict appellant of the conspiracy and importation of marijuana from Jamaica—counts II and III of the indictment.

II. There was insufficient evidence to prove the existence of a single conspiracy to distribute cocaine, marijuana, and heroin as charged in count IV of the indictment.

III. The trial court erred when it allowed the government to amend the terms of the indictment to prove the continuing series element of the CCE charge.

IV. The government failed to prove each essential element of the continuing criminal enterprise charge beyond a reasonable doubt.

V. The trial judge abused his discretion when he denied appellant's motion for a *Byrd* severance.

VI. The trial judge erred when he imposed consecutive sentences for the conspiracy counts to the sentence imposed for the CCE conviction.

Issues I through V deal with claimed errors during trial. One who becomes a fugitive during trial waives the right to contest such on appeal. *United States v. London*, 723 F.2d 1538, 1539 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

Issue VI deals with a sentencing problem and the government agrees there is error. The conspiracies set forth in Counts II, IV and VI of the indictment merge with appellant's convictions as to the continuing criminal enterprise charged in Count I. Since we affirm the conviction as to Count I, the convictions and sentences imposed under Counts II, IV and VI are hereby vacated. *United States v. Nixon*, 918 F.2d 895 (11th Cir. 1990).

The judgment of the district court is affirmed in all respects except as to Counts II, IV and VI wherein the convictions and sentences are vacated.

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, who became a fugitive during trial and was recaptured before sentencing and filing a notice of appeal, forfeited his right to appeal alleged trial errors.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1458

ALBERTO A. ROSALES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 978 F.2d 719 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1992. The petition for a writ of certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of engaging in a continuing criminal

enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); two counts of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Counts 2, 4); one count of conspiracy to possess various controlled substances with intent to distribute them, in violation of 21 U.S.C. 846 (Count 6); two counts of importation and attempted importation of marijuana, in violation of 21 U.S.C. 952(a) (Counts 3, 5); and three counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 7, 9, and 11). Petitioner was sentenced to 45 years' imprisonment on the CCE count and to consecutive terms of five years' imprisonment on each of the eight remaining counts, for a total of 85 years' imprisonment. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and affirmed in all other respects. Pet. App. A1-A2.

1. The evidence at trial is recounted in the government's brief in the court of appeals. Gov't C.A. Br. 4-25. Petitioner was the head of a drug ring that trafficked in heroin, cocaine, and marijuana from January 1982 to May 1985. In 1982, federal agents seized in transit several shipments of marijuana that members of petitioner's ring had attempted to smuggle into the country from Jamaica and Colombia. In 1984, one of petitioner's partners, David Quiles, quit the ring and began cooperating with the DEA. In March 1985, at the direction of DEA agents, Quiles arranged to purchase from petitioner and others one kilogram of heroin for $280,000. The negotiations culminated in the delivery of the heroin on May 13, 1985, at which time petitioner and his cohorts were arrested.

2. The trial of petitioner and his co-defendants commenced on March 23, 1987. Thereafter, on April 16, 1987—the 14th day of trial and one day after the prosecution ended its case-in-chief—petitioner absconded, and a bench warrant was issued for his arrest. Gov't C.A. Br. 3. The district court proceeded with the trial in petitioner's absence. On April 17, 1987, the jury returned its verdict convicting petitioner on all counts. Petitioner remained a fugitive until November 26, 1988, when a federal arrest warrant was served upon him in Kansas, where he was incarcerated following his arrest on state charges. Petitioner was subsequently returned to the Southern District of Florida, where he was sentenced on the instant convictions on March 29, 1989. *Id.* at 3-4.

3. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and in all other respects confirmed the convictions and sentences. Pet. App. A1-A2. The court of appeals vacated petitioner's convictions and sentences on the conspiracy counts based on its holding that petitioner's convictions on the various conspiracy counts had merged with his conviction on the CCE count.

Although the court reached the merits of the claim of "merger" because it concerned a "sentencing problem" that arose after petitioner's recapture, it refused to consider any of petitioner's allegations concerning errors that occurred during the course of trial. In declining to pass on the merits of the trial claims, the court relied on its prior decision in *United States* v. *London*, 723 F.2d 1538, 1539 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), in which it had

held that "[o]ne who becomes a fugitive during trial waives the right to contest such [issues] on appeal." Pet. App. A2.

DISCUSSION

Petitioner contends that the court of appeals erred in holding that, by fleeing during trial and before sentencing, he waived his right to appeal his convictions based on alleged errors committed at trial.

After the court of appeals decided this case, this Court decided *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993), in which it held that appellate courts may not automatically dismiss appeals filed by ex-fugitives who have been returned to custody before invoking their appellate rights.[1] Although the Court stated that courts of appeals are not "entirely without authority to dismiss an appeal because of fugitive status predating the appeal," *id.* at 1208, it held that that authority may be exercised only if a defendant's fugitivity effected a "significant interference with the operation of [the] appellate process." *Id.* at 1209.

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[1] Unlike petitioner, who fled during trial, the defendant in *Ortega-Rodriguez* became a fugitive after being convicted on drug trafficking charges. Like petitioner, however, Ortega-Rodriguez was recaptured prior to sentencing and filing a notice of appeal. The court of appeals in that case dismissed the appeal, relying on its earlier decision in *United States* v. *Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), in which it held that a defendant who flees after conviction, but before sentencing, waives his right to appeal from his conviction. This Court vacated the court of appeals' order dismissing the appeal and remanded the case for further proceedings.

Because the court of appeals' refusal in this case to consider petitioner's allegations of trial error was based on an automatic rule of dismissal that this Court repudiated in *Ortega-Rodriguez*, the court's judgment should be vacated and the case remanded for further consideration. On remand, the court of appeals may once again refuse to consider the merits of petitioner's claims only if it determines that "th[e] consequence of petitioner's flight" caused "a significant interference with the operation of its appellate process." *Ortega-Rodriguez*, 113 S. Ct. at 1209.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the court of appeals for further proceedings consistent with this Court's decision in *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993).

Respectfully submitted.

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